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Order 2004-7-23



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 23rd day of July, 2004

Served: July 23, 2004

In the Matter of

2004 Combination Frequencies (U.S.-China)

Docket OST-2004-18469

ORDER

Summary

By this Order we allocate seven weekly frequencies to Northwest Airlines, Inc. (Northwest) and seven weekly frequencies to United Air Lines, Inc. (United) for combination services in the U.S.-China market.

Background

On June 18, 2004, representatives of the United States and the People's Republic of China (PRC) initialed a Protocol amending the U.S.-PRC aviation agreement. The amended agreement greatly expands the opportunities for air carriers of both countries. These opportunities are increased progressively through 2010. Among the first opportunities for U.S. carriers is the ability of the United States to allocate 14 additional combination frequencies, effective August 1, 2004.

On June 21, the Department issued a Notice announcing the above August 1 combination allocation opportunities under the amended agreement. Our Notice invited Northwest and United, the only U.S. carriers eligible to use these frequencies at this time, to file applications for the available frequencies. Applications were due June 28; answers, July 6; and replies, July 8.

Applications

Northwest and United each filed an application seeking allocation of seven weekly frequencies. Northwest would use its seven frequencies to operate a daily Detroit-Guangzhou service via Tokyo. United would use its seven frequencies to operate a daily nonstop Chicago-Shanghai service. Each of these carriers plans to begin these new services on or about October 31, 2004.

Pleadings

American Airlines, Inc. (American) filed an answer opposing Northwest's and United's applications as well as an objection to the Department's Notice. Northwest and United replied to American's answer and also answered American's objection.¹ Hawaiian Airlines, Inc. (Hawaiian) also answered American's objection. American replied to the answers to its objection.

American's position is that until the Department has invited and received applications from all carriers that could use the 14 frequencies, including not only Northwest and United but also new entrant applications for the 2005 combination service designation, the Department is constrained by the *Ashbacker* doctrine, which requires that mutually exclusive licensing applications must be accorded comparative consideration.² American requests that the Department incorporate the applications by Northwest and United for the 14 frequencies now available into the upcoming carrier selection case for the additional combination designation and seven additional frequencies that become available March 25, 2005. American argues that awarding the frequencies now to Northwest and United would increase the dominant position of those two carriers in the U.S.-China market while precluding an evaluation of whether the market would be better served by awarding some or all of those frequencies to a new entrant. Specifically as regards United, American states that during the pendency of a 2001 carrier selection proceeding for new China service where American was proposing Chicago-Shanghai service, United announced that it would introduce its own Chicago-Shanghai service. American then asserts that after the Department had selected a carrier other than American, United reneged on its intention to serve Chicago-Shanghai. American also maintains that the Department should address the issue of the scope of authority to be awarded under the Protocol, *i.e.*, by determining that all applicants that receive awards will have the flexibility to change city pairs as determined by market conditions.

Northwest and United, for their part, argue that allocation of the 14 frequencies does not require a comparative selection proceeding under *Ashbacker* because *Ashbacker* applies only when 'similarly situated' persons seek mutually exclusive rights. Since American is not designated to serve China, American is not similarly situated to the designated incumbents. They further note that American has not applied for, and might not be selected to receive, the designation that becomes available in 2005. The carriers state that American has provided no legal or policy basis for the Department to defer allocation of valuable, immediately available frequencies. They argue that the Department's consistent policy has been to favor use of available rights; that American repeatedly has asserted as much in other cases; that U.S. negotiators engaged in tough bargaining to secure these rights; and that the Department should now proceed to enable Northwest and United to begin these new services in a timely manner.

Finally, Hawaiian urges the Department to have at least three separate proceedings, one addressing the 2004 opportunities, one addressing the 2005 and 2006 opportunities, and one addressing the 2008 and 2010 designations.

Decision

We have decided to allocate seven weekly frequencies to Northwest and to United for combination services in the U.S.-China market.

We have examined American's *Ashbacker* argument and concluded that the *Ashbacker* doctrine does not apply to the facts of this proceeding. There is no "mutual exclusivity" because Northwest and United are

¹ American, Northwest, and United accompanied various submissions with motions for leave to file. In the interest of having a complete record, we will accept all the submissions.

² *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U.S. 327, (1945).

the only designated carriers who have filed applications for the 14 frequencies available in this proceeding. Under the Protocol, only designated airlines are entitled to operate the weekly frequencies for combination services effective August 1, 2004. American is not “similarly situated” since it is not a designated carrier and is, therefore, not eligible for the 14 frequencies available August 1, 2004. Indeed, United correctly points out that American has not indicated any interest in using more than the seven frequencies available March 25, 2005, and no other carrier has applied for the combination service frequencies for use in 2005.³ The immediate award of the 2004 frequencies will not preclude American from applying for the additional seven frequencies available in the 2005 proceeding.

We find that these circumstances are analogous to the facts of Order 91-8-30⁴ where the Department rejected an argument by Delta Air Lines that the *Ashbacker* doctrine required comparative consideration of a Northwest application for Los Angeles-Sydney authority. Northwest was a designated carrier for that route, whereas Delta was not designated to serve Australia. Because we could not award Delta any authority at that time, we found that *Ashbacker* was inapposite. For the same reason, we conclude that there is no legal requirement under *Ashbacker* that we combine the applications in this case with any applications we might receive in subsequent proceedings to award new rights made available by the recently initialed Protocol.

Beyond the *Ashbacker* issue, as a policy matter we give great weight to the fact that the new U.S.-China agreement, with its carefully phased structure for the introduction of new frequencies and designations, expressly provides for 14 new U.S. combination frequencies effective August 1, 2004. These are valuable rights, and it is longstanding Department policy to maximize the timely use of bargained-for rights in limited entry markets. American has presented no persuasive reason for us not to follow that policy here.⁵ Accordingly, we find that the public interest favors our allocating these frequencies now to Northwest and United.

Consistent with our current practice, the frequencies allocated in this proceeding will be for an indefinite term, provided that the recipient continues to hold the underlying economic authority to serve the market. The awarded frequencies will also be subject to our standard 90-day dormancy condition, where for any frequency not used for a period of 90 days, the allocation with respect to that frequency will expire and will revert back to the Department for reallocation so that it can be made available to another carrier on an immediate basis. The carriers have stated their intent to begin services by October 31, 2004. We will allow the carriers a reasonable opportunity after that date to begin services with each of the frequencies allocated. However, any frequency not used by November 10, 2004, will automatically revert to the Department for reallocation. In light of the history of Chicago-Shanghai service, we will, furthermore, condition our frequency award to United to require that United use the frequencies allocated here to operate exclusively in the Chicago-Shanghai nonstop market, as it proposes. Should United seek to alter its service or its routing, it will need to seek authority from us to do so.⁶

ACCORDINGLY,

³ Reply of United, July 8, 2004 at 3.

⁴ Order 91-8-30, August 19, 1991 at 4.

⁵ American has cited to us language from the U.S.-Peru Combination Service Proceeding (1996) (Order 96-6-53, at 11) to support its position that we should not be influenced here by Northwest’s and United’s proposed start-up dates in proceeding to award authority. American’s July 6 Answer/Reply at 5. We disagree. The early introduction of additional capacity in the U.S.-China air services market was a U.S. objective in the negotiations with China, and the utilization of that opportunity by U.S. carriers therefore represents one of the important benefits to consumers of air services achieved in the agreement. In these circumstances, we believe that the proposals’ start-up dates should be given significant weight. American has not persuaded us otherwise.

⁶ We do not see a need to address American’s broader concern on flexibility to change city pairs at this time.

1. We allocate seven weekly frequencies to Northwest Airlines, Inc. for air transportation services of persons, property, and mail between the United States and China;
2. We allocate seven weekly frequencies to United Air Lines, Inc. for air transportation services of persons, property, and mail in the Chicago-Shanghai market on a nonstop basis consistent with the discussion set forth in this order;
3. The allocations granted in ordering paragraphs 1 and 2 above are effective immediately and shall remain in effect for an indefinite period, provided that the carriers inaugurate services with each of their frequencies by November 10, 2004; any frequency not inaugurated by that date will revert to the Department for reallocation. In addition, once a carrier inaugurates service, any frequency not used for a period of 90 days will expire automatically and will revert to the Department for reallocation;
4. We grant all of the motions for leave to file;
5. To the extent not granted, we deny all other requests in this proceeding;
6. We may amend, modify, or revoke this order at our discretion, without hearing; and
7. We will serve this order on American Airlines, Inc., Northwest Airlines, Inc., Hawaiian Airlines, Inc., United Air Lines, Inc., the Ambassador of the People's Republic of China in Washington, DC, the Department of State (Office of Aviation Negotiations), and the Federal Aviation Administration.

By:

KARAN K. BHATIA
Assistant Secretary
for Aviation and International Affairs

(SEAL)

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